

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
CANVS Corporation) ASBCA No. 56347
)
Under Contract No. 0000-00-0-0000)

APPEARANCE FOR THE APPELLANT: Mr. Jonathan A. Walkenstein
President

APPEARANCES FOR THE GOVERNMENT: COL Anthony M. Helm, JA
Chief Trial Attorney
Craig S. Clarke, Esq.
Deputy Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

In this appeal, CANVS Corporation (CANVS) claims patent infringement by the Department of the Army, contending that the Army was responsible for the unlicensed use of its patent relating to enhanced night vision goggles. The claim of unlicensed use arose under a contract between the Army and ITT Industries Night Vision (ITT). The Army has moved to dismiss this appeal. CANVS opposes dismissal. For reasons stated below, we grant the Army's motion.

FINDINGS OF FACT

1. The Army awarded to ITT an enhanced night vision goggle (ENVG) contract, Contract No. W91CRB-05-D-0012, in March 2005 (CANVS administrative claim, cover ltr. dtd. 10 October 2005). It is undisputed, and we find that CANVS was not a party signatory to this contract.

2. According to CANVS, ITT's performance under the above contract infringed its patent No. 6,911,652 B2. CANVS communicated this position to the contracting officer at the pre-bidders conference for the contract. According to CANVS, the contracting officer promised to advise CANVS of the Army's position in a few days, but to date has not done so. (Bd. corr. ltr. dtd. 17 March 2008)

3. On or about 10 October 2005, appellant submitted an administrative claim for patent infringement to the Army, seeking compensation for the unlicensed use of its patent. The Army denied the CANVS patent infringement claim on or about

11 April 2007. CANVS sought reconsideration and provided additional materials on or about 8 June 2007. According to CANVS, it received an email from the Army dated 3 March 2008 to the effect that the government was reviewing the request for reconsideration but could not say when the review would be completed. (Bd. corr. ltr. dtd. 17 March 2008)

4. In view of the above, appellant sought the help of the ASBCA “to address our concerns without having to resort to the Court of Federal Claims” (*id.*, at 2, 3). Appellant’s notice of appeal stated that the bases for the appeal are the following: the contracting officer has failed to issue a decision within a reasonable time; CANVS submitted a proper claim (its patent infringement claim); appellant seeks licensing fees for ENVG and ENVG-related contracts, future contracts, and various weapons programs; and, the government acted contrary to policies, procedures, and regulations (notice of appeal dtd. 5 March 2008).

5. The Army moved to dismiss the appeal for lack of jurisdiction, and CANVS has filed in opposition to dismissal.

DECISION

Insofar as pertinent here, the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, provides the Board with jurisdiction to decide appeals from decisions of contracting officers on claims relative to contracts awarded by the Department of the Army. 41 U.S.C. § 607(d). Claims under these contracts may be submitted by the government or the contractor. 41 U.S.C. § 605(a). Appeals may be filed only by a contractor. 41 U.S.C. § 606. *Fireman’s Fund Insurance Co. v. England*, 313 F.3d 1344, 1350-51 (Fed. Cir. 2002). The CDA defines a “contractor” as a party to a government contract other than the government. 41 U.S.C. § 601(4).

CANVS has the burden of proof to establish that the Board has jurisdiction over its appeal. *Alpine Computers, Inc.*, ASBCA No. 54659, 05-2 BCA ¶ 32,997. CANVS has not shown it was a party signatory to the ITT contract or to any other current Army contract. CANVS argues that its infringement claim for unlicensed use makes it a *de facto* party to the ITT contract. We are not persuaded by this argument. CANVS provides no authority for the proposition that it may be considered a *de facto* party to the ITT contract under the CDA under these circumstances.

We conclude that CANVS is not a “contractor” as defined by the CDA for purposes of submitting claims and filing appeals under the Act.

The Department of Defense (DoD) has established an administrative procedure for the review of patent infringement claims against its departments and agencies. See

DFARS 227.7004, 48 C.F.R. § 227.7004 (2007). It is DoD policy to take all steps necessary to “investigate, and to settle administratively, deny, or otherwise dispose of such claim prior to suit against the United States.” DFARS 227.7001, 48 C.F.R. § 227.7001 (2007). CANVS has taken advantage of this administrative procedure.

With respect to judicial remedy, 28 U.S.C. § 1498(a) states, in part, as follows:

Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner’s remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

See also FAR 27.201-1(a), revised effective 7 December 2007, which provides that the “exclusive remedy for patent or copyright infringement by or on behalf of the Government is a suit for monetary damages against the Government in the Court of Federal Claims.”

None of the aforementioned administrative or judicial remedies involves the ASBCA. We have duly considered all of CANVS’ arguments in support of our jurisdiction, but are not persuaded by them.

CONCLUSION

For reasons stated, we lack jurisdiction over this appeal. The Army’s motion is granted and the appeal is dismissed.

Dated: 20 June 2008

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56347, Appeal of CANVS Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals